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April 20, 2012

Cynthia T. Brown
Director
Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423

Re: Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company, Docket No. NOR 42056

Dear Ms. Brown:

Enclosed for filing in the above-referenced proceeding please find an original and ten (10) copies of Complainant Texas Municipal Power Agency's Petition to Reopen and Modify Rate Prescription.

Please date stamp the extra copy of this cover letter and the enclosed filing and return them to our messenger. Thank you for your attention to this matter.

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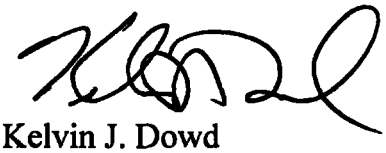
Respectfully submitted,



Kelvin J. Dowd
An Attorney for Texas Municipal Power Agency

Enclosures

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APR 20 2012
SURFACE
TRANSPORTATION BOARD

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY	)	
Complainant,	)	
v.	)	**Docket No. NOR 42056**
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY	)	
Defendant.	)	

PETITION TO REOPEN AND MODIFY RATE PRESCRIPTION

TEXAS MUNICIPAL POWER AGENCY

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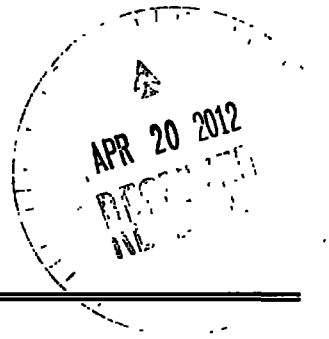

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY	)	
Complainant,	)	
v.	)	**Docket No. NOR 42056**
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY	)	
Defendant.	)	

PETITION TO REOPEN AND MODIFY RATE PRESCRIPTION

Complainant, Texas Municipal Power Agency ("TMPA"), pursuant to 49 U.S.C. § 722(c) and 49 C.F.R. Part 1115.4, hereby petitions to reopen the decisions and orders in *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 6 S.T.B. 573 (2003) ("*TMPA 2003*") and *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, 7 S.T.B. 803 (2004) ("*TMPA 2004*"), as subsequently corrected in part by *Texas Mun. Power Agency v. Burlington N. & Santa Fe Ry.*, STB Docket No. 42056 (STB served Oct. 29, 2004), and modify the maximum rail rate prescriptions ordered therein on grounds of changed circumstances. Specifically, upon receipt of appropriate, limited additional evidence concerning stand-alone costs ("SAC") and updated variable costs for the traffic at issue, the Board should revise its schedule of the maximum rates that Defendant, BNSF

Railway Company ("BNSF")[1] can charge for the transportation of coal to TMPA's Gibbons Creek Generating Station established in *TMPA 2004*, and extend the rate prescription from 2011 through 2021. This relief is mandated by changes in circumstances that prove that assumptions in the original prescription regarding future rate levels for the issue traffic, and forecasts of future inflation, transportation revenues, and certain other specific components of the SAC analysis, were seriously inaccurate.

Consistent with precedent, including the Board's previous handling of similar petitions advanced by rail carriers subject to rate prescriptions on utility coal traffic, the scope of reopening should be limited to consideration of the impact of the revised, post-2010 projection of GCRR[2] stand-alone revenues from the issue traffic on the DCF analysis, and updates of indices and forecasts included in *TMPA 2003* and *TMPA 2004* that have proven to be inaccurate (*e.g.*, inflation forecasts, equity capital costs, coal traffic and revenue forecasts, etc.). In all other respects, the Board's evaluation of SAC on reopening should be based on the record and findings in *TMPA 2003* and *TMPA 2004*. When re-evaluated in light of those changed circumstances, the portions of the final rate prescription schedule in *TMPA 2004* applicable to the years 2011 through 2021 addressing the issue rates and SAC should be revised as shown in Table 1, below.

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[1] BNSF is successor in interest to the named Defendant in this proceeding.

[2] *TMPA 2003* and *TMPA 2004* evaluated the reasonableness of the challenged BNSF tariff rates under the SAC constraint of the Board's *Coal Rate Guidelines*, based on the costs and revenues associated with a hypothetical substitute rail carrier designated as the Gibbons Creek Railroad or "GCRR."

Table 1

Year	TMPA 2004[3] Tariff Rate	New[4] Tariff Rate	Revised[5] SAC Reduction	Revised[6] SAC Rate
2011	$25.33	$29.70	18.61%	$24.17
2012	$26.09	$31.21	11.64%	$27.58
2013	$26.88	$31.84	9.90%	$28.69
2014	$27.68	$32.36	6.43%	$30.28
2015	$28.51	$32.97	4.66%	$31.43
2016	$29.37	$33.48	7.29%	$31.04
2017	$30.25	$33.73	10.59%	$30.16
2018	$31.16	$34.01	13.36%	$29.47
2019	$32.09	$34.23	15.64%	$28.88
2020	$33.05	$34.38	15.71%	$28.98
2021 (1Q)	$33.05	$34.38	14.19%	$29.50

The revised Gibbons Creek rate prescription also must take into account the "jurisdictional threshold" of 180% of variable service costs, as 49 U.S.C. § 10707(d) effectively precludes the Board from setting a maximum rate below that level. As explained *infra*, for purposes of determining a revised prescription on reopening in this case, the variable cost determinations already made by the Board in *TMPA 2003* should be updated to reflect intervening changes in unit costs, etc., but must be based on the same movement-specific analysis that constitutes the law of the case in this proceeding.

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[3] *TMPA 2004*, 7 S.T.B. at 832.

[4] Verified Statement of Thomas D. Crowley and Daniel L. Fapp (attached) ("V.S. Crowley/Fapp"), Exhibit No. 4.

[5] V.S. Crowley/Fapp, Exhibit No. 4.

[6] V.S. Crowley/Fapp, Exhibit No. 4.

Updating those costs, however, requires certain data specific to the subject movement that is solely in the possession of BNSF. In its order granting this Petition, therefore, the Board should prescribe a relatively short period wherein TMPA can request and BNSF produce 2011 iterations of the same data relied upon in *TMPA 2003*, so that the parties can address and the Board can determine the jurisdictional threshold level applicable to the revised prescription for 2011.[7] Appropriate Board staff can convene a technical conference should that be necessary or appropriate to expeditiously resolve any data-related issues that arise between the parties.

In support hereof, TMPA shows as follows:

BACKGROUND

Previous submissions throughout the course of these proceedings have described in detail the identity and composition of TMPA, the mission of the agency and its responsibilities to its Member Cities, and the relevant facts regarding the location, design and operation of the Gibbons Creek Station. These facts need not be repeated here. As has been the case since its creation in 1975, TMPA exists to provide low-cost, wholesale electrical power to the Texas cities of Bryan, Denton, Garland and Greenville, for redistribution to their residential and corporate citizens. Gibbons Creek remains TMPA's critical asset in the fulfillment of this mission.

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[7] As the Board acknowledged in *TMPA 2003* (6 S.T.B. at 608) and is noted by Witnesses Crowley and Fapp, variable costs for subsequent years must be determined on an annual basis, once the necessary, underlying data is available. V.S. Crowley/Fapp at 9.

In response to a Complaint submitted by TMPA in 2001, the Board ruled in *TMPA 2004* that the rates assessed by BNSF for common carrier coal transportation service to Gibbons Creek – transportation over which BNSF possesses market dominance under 49 U.S.C. § 10707 – exceeded lawful maximum levels, and ordered their reduction. Applying the *Coal Rate Guidelines*' SAC constraint, the Board found that on a net present value basis over the 20-year discounted cash flow ("DCF") period used in the SAC test at the time, the revenues contributed by the traffic group served by the hypothetical GCRR, which included TMPA's coal traffic, exceeded the total costs (including return on investment) attributable to the GCRR's provision of service to that group by a total of approximately $108.2 million.[8] Key elements of the SAC analysis were the Board's forecasts of the revenues that BNSF would earn from transportation of the issue traffic and the other traffic projected to be handled by the GCRR over the 20-year DCF period, as well as the effects on SAC of forecasted inflation and projections of the future cost of capital for the GCRR over the same period. The Board based its forecast of issue traffic revenues on BNSF's then-current tariff rates, and projected that in 2011, the rate on TMPA's traffic would be $25.33 per ton.[9]

That stand-alone revenues for the GCRR exceeded SAC served as proof that the BNSF rates under challenge were unreasonably high, and that TMPA was entitled to prescriptive relief under 49 U.S.C. § 10704. Under the *Guidelines* as administered at the time, the relief due TMPA in any given year was measured by

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[8] *TMPA 2004*, 7 S.T.B. at 831.

[9] *See TMPA 2003*, 6 S.T.B. at 609; *TMPA 2004*, 7 S.T.B. at 832.

reference to the relationship between stand-alone revenues and costs on a net for that year. The Board's analysis showed that while revenues exceeded costs on a net present value basis for each of the years 2001 through 2010 by a total of approximately $221.5 million, costs exceeded revenues for the individual years 2011 through 2021 by a total of about $113.3 million.[10] The Board therefore effectively shifted some surplus revenues from the years 2001-2010 to offset deficits in the years 2011-2021, such that revenues and costs for each year of the latter period exactly equaled each other. The end result was that TMPA's rate relief for 2001-2010 was limited to 49% of what it would have been but for the "netting" exercise,[11] based upon the Board's revenue assumptions and forecasted GCRR costs. However, the Board held that over the entire 20-year period, a balance would be struck such that "the GCRR would earn just enough to cover all its costs and earn a reasonable return of its investment." *TMPA 2003*, 6 S.T.B. at 607.

The Board's final determination of SAC for the GCRR and its projection of corresponding revenues – including in particular the assumed trend in BNSF rates on the issue traffic[12] – led to an award of prescriptive relief predicated on an artificially adjusted (reduced) surplus of stand-alone revenues over costs in the years 2001 through 2010, and an equilibrium between such revenues and costs in the years 2011 through 2021.[13]

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[10] *See TMPA 2004*, 7 S.T.B. at 831.

[11] *TMPA 2004,* 7 S.T.B. at 831.n.**

[12] *TMPA 2003,* 6 S.T.B. at 607 (DCF calculations were executed "[u]nder the current rate structure...").

[13] *TMPA 2004*, 7 S.T.B. at 831.

Through this approach, "over the entire 20-year SAC analysis period this traffic group would generate just enough revenue to cover the GCRR's revenue requirements." *TMPA 2004,* 7 S.T.B. at 831.

Through the end of 2010, BNSF complied with the Board's earlier decisions, and established and maintained rates on coal shipments to Gibbons Creek in accordance with the prescriptions that were based on the tariff rates assumed by the Board in its DCF analysis.[14] *See TMPA 2003*, 6 S.T.B. at 609-610. However, in the fourth quarter of 2010, over TMPA's strong objection, BNSF unilaterally established a new common carrier rate for Gibbons Creek coal service effective January 1, 2011 – $29.70 per ton – that was $4.37 per ton *higher* than the issue traffic rate for 2011 that was assumed in the Board's previous decisions.[15] *See TMPA 2004,* 7 S.T.B. at 832. Late in 2011 and early in 2012, BNSF charged a rate of $31.21 per ton for shipments made by TMPA to Gibbons Creek,[16] which is $5.12 higher than the $26.09 per ton assumed in *TMPA 2004*, on which the exact match of SAC and GCRR revenues (including the revenues shifted from the 2001-2010 time period) evident in the Board's rate prescription table was based.

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[14] *Petition for Enforcement of Decision*, STB Docket No. NOR 42056 (filed Dec. 17, 2010) ("*Enforcement Petition*"), V.S. Parsons at 3-4.

[15] *See BNSF's Reply to TMPA's Petition for Enforcement of Decision*, STB Docket No. NOR 42056 (filed Jan. 6, 2011) ("*BNSF Reply*") at 6; Common Carrier Pricing Authority BNSF 90115, Exhibit No. 1 hereto.

[16] *See* Exhibit No. 2 hereto, which is a copy of a BNSF invoice showing the $31.21 rate. As of the filing of this Petition, BNSF has not formally established a 2012 iteration of BNSF's Common Carrier Pricing Authority BNSF 90115.

On December 17, 2010, TMPA filed the *Enforcement Petition* in response to BNSF's 2011 tariff rate increase. TMPA sought an order from the Board directing BNSF to desist from charging any rate higher than the "SAC Rate" designated in the Board's *TMPA 2004* rate prescription table for each of the years 2011 through 2021. In its filing, TMPA explained the legal, logical and policy bases for the relief requested, and pointed out, *inter alia*, that to permit BNSF to exceed those rate levels for 2011-2021 after TMPA's rate relief for 2001 through 2010 had been limited in order to achieve equilibrium between those levels and SAC would allow an unlawful over-recovery of SAC over the full 20-year DCF period. *See, e.g., Enforcement Petition* at 7-12. BNSF opposed TMPA's Petition.

In a decision served July 27, 2011, the Board denied the relief sought by TMPA in its *Enforcement Petition*. Relying on what it deemed the "plain language" of the *TMPA 2003* and *TMPA 2004* decisions, the Board ruled that the rate prescription was limited to the years 2001 through 2010, and that BNSF was free to establish any rate it chose after 2010:

> In 2004 the Board reviewed the SAC evidence and the results of the DCF analysis showing that the SARR's revenues would exceed its costs during the first 10 years of the SAC analysis period, but that its costs would exceed revenues during the second 10 years.[20] Further, the DCF analysis showed that '[t]he sum of the present values of over-recoveries exceeds the under-recoveries, thus demonstrating that the existing rate level is too high.'[21] That is, the agency concluded (in 2004) that TMPA was eligible for relief from BNSF's unreasonable rates from 2001 to 2010, but not from 2011 to 2021, because BNSF's forecasted rates were not shown to be unreasonable in the latter years.

Texas Mun. Power Agency v. The Burlington N. & Santa Fe Ry., STB Docket No. 42056 (STB served July 27, 2011) ("*Enforcement Decision*") at 4 (footnotes omitted). The Board briefly entertained the idea of reopening this proceeding to consider revising what it now ruled was only a 10-year prescription, but declined to do so. *Id.* at 5. TMPA filed a timely petition for reconsideration of the *Enforcement Decision*, but in a decision served January 20, 2012, the Board denied that relief as well.[17]

SUMMARY

The Board's rate decisions in *TMPA 2003* and *TMPA 2004* were grounded on applications of the *Coal Rate Guidelines*, which relied on a number of key findings and assumptions regarding SAC for the service provided by the GCRR. These included the configuration of the GCRR and the traffic group that it served, the estimated costs of its construction and operation, and the volume of traffic that would be handled and revenues that would be earned by the hypothetical carrier. *See, e.g., TMPA 2003,* 6 S.T.B. at 586-587.

Among the forecasted data were projections of the rates that the incumbent BNSF would charge to transport the issue traffic, which contributed to the GCRR's expected revenues. The Board based revenues from the Gibbons Creek traffic on BNSF

[17] The filing of TMPA's Petition for Reconsideration on August 16, 2011 tolled the 60-day period for TMPA to petition for judicial review of the *Enforcement Decision* under the Hobbs Act. 28 U.S.C. § 2344. TMPA filed a Petition for Review in the U.S. Court of Appeals for the D.C. Circuit on February 10, 2012. *Tex. Mun. Power Agency v. Surface Transp. Bd. & United States*, Case No. 12-1087 (D.C. Cir. Feb. 10, 2012). The Board's January 20, 2012 denial of reconsideration is non-reviewable, and does not form part of the decision now before the Court of Appeals. *See I.C.C. v. Bhd. of Locomotive Eng'rs, Et Al.*, 482 U.S. 270, 278 (1987).

Common Carrier Pricing Authority 90042 as then in effect and under challenge, with projected future changes predicated on the rate adjustment provisions of that pricing document. *Id.*, at 601 n.64.[18] Consistent with those provisions, the Board's decisions assumed that in 2011, BNSF's rate on the issue traffic would be $25.33 per ton, and would increase gradually to $33.05 per ton by the first quarter of 2021. *Id.* at 610. However, starting in 2011, the Board's assumption regarding this key component of the SAC analysis proved to be seriously inaccurate. Instead of $25.33 per ton, BNSF established a common carrier rate of $29.70 per ton. Conservatively estimating increases in that rate into the future based on forecasted changes in BNSF's system average costs shows that by 2021, the rate would be $34.38 per ton, rather than $33.05 as assumed by the Board. *See* V.S. Crowley/Fapp, Exhibit No. 3.

The Board's earlier decisions also relied on a number of forecasts and assumptions regarding inflation, expected capital costs for the GCRR, rail cost changes, and future changes in coal volumes and revenues attributable to the GCRR traffic group. *See, e.g., TMPA 2003*, 6 S.T.B. at 599, 602-603, 750. As detailed by witnesses Crowley and Fapp, however, actual experience and updated or more recent forecasts show that these assumptions likewise were inaccurate, particularly as regards cost inflation for land, materials and supplies, and projected coal revenues for the GCRR based on forecasts

[18] BNSF Pricing Authority 90042 included a provision for rate adjustments based on quarterly changes in the Rail Cost Adjustment Factor, without adjustment for improvements in railroad productivity. *See* Exhibit 3 hereto.

published by the U.S. Energy Information Administration. *See* V.S. Crowley/Fapp at 3-5.

The under-estimation of the rates to be charged to the issue traffic during the second half of the 20-year DCF period, and the disparity between the inflation forecasts and other projections relied upon in *TMPA 2003* and *TMPA 2004* and the actual values and current forecasts, constitute "changed circumstances" which support a limited reopening of this proceeding under 49 U.S.C. § 722(c) and 49 C.F.R. Part 1115.4. Reopening is particularly appropriate because of the role that both of these data sets play in the SAC analysis that applies to this case. The principal precedential guides for the action that now should be taken are the Board's rulings in 2003 and 2004 in Docket No. 41185, *Arizona Public Service Company and Pacificorp v. The Atchison, Topeka and Santa Fe Railway Company* ("*APS*").

In *APS*, the Board reopened a five (5) year-old rate prescription at the request of BNSF's predecessor to examine the implications of a change in a component of the traffic base for the stand-alone railroad from the forecast on which the original ruling was based. The Board also limited the scope of the reopening (over the objection of the complainant shipper) to the impact of the corrected traffic data, and the updating of indices and forecasts which the passage of time had shown were inaccurate. *APS*, 6 S.T.B. 851, 855-57 (2003). No intervening changes in Board policy toward maximum rate adjudications were considered, and the parties "[could] not seek to reargue or recalculate the costs upon which the [SAC] projections were based." *Id.* at 857.

Following the *APS* precedent, TMPA herein demonstrates that when revised to incorporate BNSF's actual post-2010 common carrier rates for service to Gibbons Creek and updates to the other forecasts and indices included in *TMPA 2003* and *TMPA 2004*, the Board's final DCF analysis shows that stand-alone revenues for the GCRR exceed costs in each of the years 2001 through 2021, and that TMPA is entitled to prescriptive rate relief in *each* of those years. *See* V.S. Crowley/Fapp at 5, Exhibit No. 4.

The Board's prescriptive authority is constrained by 49 U.S.C. §10707(d), which limits the agency's jurisdiction to rates that meet or exceed a threshold of 180% of the variable service costs for the subject movement. In this case, the Board made a final determination of the methodology to calculate variable costs for BNSF's Gibbons Creek service in *TMPA 2003*, which is the law of the case for this proceeding. As there have been no statutory changes in the scope of the Board's jurisdiction since that decision, the *APS* model likewise rules out intervening policy shifts affecting that final ruling, leaving the task of updating the previously-calculated variable costs for subsequent changes in BNSF's unit costs and other elements of the earlier movement-specific variable cost determination.[19] As explained further in witnesses Crowley and Fapp's Verified Statement, certain data and information needed for this exercise is in the exclusive possession of BNSF, and must be produced before the updated variable costs (and

[19] This also is consistent with the Board's own directive in *TMPA 2003* that any future variable cost determinations that might be necessary should be calculated "in a manner consistent with the procedures and findings contained in [this decision]...." 6 S.T.B. at 608.

jurisdictional threshold) can be calculated. The Board's order on reopening should allow a time period for the assembly and production of this updated information.

As shown in greater detail below and in the accompanying expert analyses, upon reopening in accordance with *APS* and related authorities, the Board should revise the SAC determinations made in *TMPA 2004* as shown in Table 1. In order to facilitate the determination of 2011 variable costs to accompany the foregoing SAC restatement and support a revised, extended rate prescription, the Board should adopt the following, expedited schedule for limited additional evidentiary submissions:

Event	**Due Date**
BNSF Reply to Petition to Reopen	May 10, 2012
STB Decision to Reopen Proceeding	Day 1
TMPA Request and BNSF Production of Data to Update Variable Costs[20]	Day 1+ 45
TMPA Opening Supplemental Presentation on Variable Costs	Day 1+ 90
BNSF Reply	Day 1+ 120
TMPA Rebuttal	Day 1+ 150

[20] During this time, Board staff would be available to convene a technical conference in the nature of those held pursuant to 49 C.F.R. Part 1114.31(a)(3), to expeditiously resolve any issues that arise between TMPA and BNSF regarding production of the updated variable cost information.

ARGUMENT

I. THE BOARD HAS AUTHORITY AND DISCRETION TO REOPEN THIS PROCEEDING

The governing statute (49 U.S.C. §722(c)) gives the Board wide latitude to reopen the record of a proceeding, and reconsider prior decisions rendered in that proceeding due to changed circumstances. The courts endorse this principle, and have affirmed that in enacting Section 722(c), Congress contemplated that the Board would exercise its authority should new developments subsequent to an original decision show that assumptions or expectations upon which that decision was based were incorrect. *See, e.g., Burlington N. R.R. v. STB*, 114 F. 3d 206, 211, 215 (D.C. Cir. 1997). *Cf. CSX Transp., Inc. v. I.C.C.*, 952 F. 2d 500, 505 (D.C. Cir. 1992). Specifically as regards decisions involving the prescription of maximum reasonable rates, the Board has considered reopening to be an appropriate remedy to address shifts in stand-alone traffic volumes or revenues from trends assumed in the initial prescription(s), as well as actual changes in costs initially projected using forecasts and indices. *Wisconsin Power & Light Co. v. Union Pac. R.R.*, 5 S.T.B. 955, 984 (2001) ("*Wisconsin*"). *See also, FMC Wyoming Corp., et al. v. Union Pac. R.R.*, 4 S.T.B. 699, 741 (2000); *APS*, 6 S.T.B. at 855-57.

As described *supra*, the rates for the issue traffic that *TMPA 2003* and *TMPA 2004* projected would be charged by BNSF (and therefore attributed to the GCRR) over the 2011-2021 time period are significantly lower than those actually put in place by BNSF. That disparity is just the sort of "shift" in revenue trends that the Board has found

would justify reopening the initial prescription. *Wisconsin,* supra. The same holds true of demonstrated differences between original and updated stand-alone revenue forecasts and indices used to inflate road property or operating expenses. *See APS*, 7 S.T.B. 1021, 1023 (2004). To be sure, in considering reopening it is important to strive to strike "an appropriate balance between the interests of fairness to all parties and of administrative finality and repose." *APS*, 3 S.T.B. 70, 75 (1998). Here, however, that balance squarely favors reopening. The existence of the changed circumstances and their centrality to the initial prescriptions is clear, and as TMPA showed in the *Enforcement Petition* and reaffirms *infra*, a failure to consider the change and revise the prescription would result in a recovery by BNSF of revenues in excess of stand-alone costs over the full 20-year DCF period, which is inconsistent with the central premise of the SAC test under the *Coal Rate Guidelines*, and inconsistent with the Board's verdict in *TMPA 2003* that its prescription order ensured "that over the entire 20-year period the GCRR would earn *just enough to cover all its costs and earn a reasonable return of its investment.*" 6 S.T.B. at 607 (emphasis added). In this case, too strong a nod to "repose" would lead directly to manifest unfairness and injustice to TMPA.

The fact that TMPA previously sought to assert its right to the full benefits of the prior prescription through its *Enforcement Petition* takes nothing away from the merits of this Petition for a limited reopening under 49 U.S.C. § 722(c). TMPA proceeded with the *Enforcement Petition* in good faith, based upon a logical reading and

application of the Board's prior orders in this case.[21] The relief requested did not require reopening of the proceeding – indeed, TMPA's thesis was that the Board's prior rulings protected the rail rates for coal service to Gibbons Creek until 2021 – so TMPA did not request it. However, TMPA respectfully disagrees with the Board's suggestion that it "affirmatively asked [the STB] *not* to reopen."[22] TMPA's prior position regarding reopening was taken in the context of a rebuttal to BNSF's claim that it could raise the rate on Gibbons Creek coal traffic with impunity, without prior Board action.[23] While TMPA does not agree with the Board's resolution of the *Enforcement Petition*, the changed circumstances regarding key elements of the original SAC analysis – the projected revenues from the issue traffic – provide independent grounds for the relief requested in this Petition.

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[21] The Board's decision denying the *Enforcement Petition* is now pending on Petition for Review before the D.C. Circuit. *See* note 11, *supra.*

[22] *Enforcement Decision* at 5 (emphasis in original).

[23] *See Enforcement Petition* at 12-14. TMPA's January 18, 2011 letter to the Board (referenced in the *Enforcement Decision*) likewise stated only that neither party had specifically requested reopening, and that BNSF's proposed rate changes and the new costs that it sought to impose on TMPA could not be enforced absent a reopening. Particularly in light of the Board's response, this Petition is not inconsistent with TMPA's prior positions.

II. THE BOARD SHOULD REOPEN ON GROUNDS OF CHANGED CIRCUMSTANCES

The forecast of future rates on the issue traffic was a central component of the SAC calculation under the *Coal Rate Guidelines* as applied in *TMPA 2003* and *TMPA 2004*. In addition to figuring in the determination of future revenues for the GCRR,[24] the level of BNSF's expected rate in each year of the DCF period was key to the establishment of maximum SAC rates under the Board's "percent reduction" rate relief methodology.[25] Similarly, the forecasts of inflation, railroad capital costs, coal traffic and revenues, and other major elements of the SAC and DCF analyses which are identified by witnesses Crowley and Fapp can be outcome determinative with regard to the reasonableness of the challenged rates. As in *APS*, the demonstrated and significant disparities between the Board's expectations as reflected in *TMPA 2003* and *TMPA 2004* and actual facts, experience and updated public forecasts justify reopening under 49 U.S.C. § 722(c). *APS*, 6 S.T.B. at 855-57. *See also Wisconsin*, 5 S.T.B. at 984.

Reopening also is warranted because absent a revision of SAC and modification of the original rate prescription, BNSF's rate increases on TMPA's traffic and the proven inaccuracies of the earlier inflation, cost and traffic/revenue forecasts relied on by the Board will result in a violation of the central premise of the SAC test: that the methodology "ensure that the cumulative revenues over the 20-year SAC analysis period would be sufficient to allow the [SARR] to recover all of its costs, *but no more*."

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[24] *See, e.g., TMPA 2003*, 6 S.T.B. at 601-602.

[25] *TMPA 2003*, 6 S.T.B. at 587 (citing *FMC Wyoming, supra*).

APS,

3 S.T.B. at 83-84 (emphasis supplied). The Board's original prescription was deemed to meet this test, as the agency found that "[u]nder the current rate structure, ... over the entire 20-year period the GCRR would earn *just enough* to cover all its costs and earn a reasonable return on its investment." *TMPA 2003*, 6 S.T.B. at 607 (emphasis supplied). However, the "current rate structure" as projected by the Board now has changed, and absent reopening, the balance between stand-alone revenues and costs would be upended.

As Messrs. Crowley and Fapp demonstrate, when the Board's original DCF model from *TMPA 2003* and *TMPA 2004* is re-run using the actual, new BNSF rates and updated forecasts and indices, the present value of the aggregate surplus of stand-alone revenues over costs over the 20-year period increases by more than $1.5 *billion* over the earlier findings, and TMPA is entitled to rate relief in each of the years 2011 through 2021. V.S. Crowley/Fapp at 5, Exhibit No. 4. The implication of these facts for the integrity of the earlier analysis is clear, and reopening and revision of the *TMPA 2004* prescription is necessary to restore the balance between revenues and costs that is the touchstone of the SAC constraint under the *Coal Rate Guidelines*. *APS*, 3 S.T.B. at 84.

Finally, as TMPA showed in its *Enforcement Petition*, BNSF's imposition of a 2011 rate higher than the forecasted rate upon which the *TMPA 2004* prescription was based, without constraint by the Board, resulted in the *de facto* elimination of a portion of the relief originally awarded to TMPA; *i.e.*, the portion of the surplus aggregate stand-alone revenue that the Board's "netting" process shifted to the 2011-2021 period to balance revenues with SAC each year. *See Enforcement Petition* at 10-

12.[26] As the Board acknowledged in *TMPA 2004*, this procedure effectively limited TMPA's rate relief during the years 2001 through 2010 to 49% of what it otherwise was entitled to in those years, in order to ensure that stand-alone revenues exactly equaled costs in each of the subsequent ten (10) years. *TMPA 2004,* 7 S.T.B. at 831. Perforce, TMPA only could realize the full measure of the value of its rate relief (*i.e.*, the other 51%) if the "current rate structure" contemplated by the Board was maintained and the 2011-2021 revenues claimed by BNSF were "just enough" to cover SAC.[27] BNSF's departure from the "current rate structure" and the divergence of original forecasts of inflation indices, capital costs, coal production volumes and transportation revenues and the other projections addressed *infra* have upset that balance, and absent action by the Board through its Section 722(c) authority, effectively will confiscate more than half of the value of the final relief awarded in *TMPA 2004*.

In its *Enforcement Decision*, the Board seemed to suggest that TMPA should have raised the issue of the inequity of losing its original rate relief – which resulted from BNSF's unanticipated rate increase in the context of the Board's netting procedure – at the time of *TMPA 2004*, and that raising the matter six (6) years later was contrary to the interest of "administrative repose." *Enforcement Decision* at 5. In fact, however, such an impediment to relief at this stage would run counter to the governing

[26] TMPA also explained the complex and essential financing and cost sharing arrangements that were struck among TMPA's Member Cities in reliance on the Board's prescription orders, and the 20-year balance of revenues and costs that they were predicated on. *See Enforcement Petition* at 15-16. The *Enforcement Decision* did not address this detrimental reliance.

[27] *TMPA 2003*, 6 S.T.B. at 607.

statute and the Board's own precedents, and should not be a factor in considering this Petition.

First, and unambiguously, 49 U.S.C. § 722(c) provides that:

> The Board may, *at any time* on its own initiative because of material error, new evidence or substantially changed circumstances -- (1) reopen a proceeding; ...An interested party may petition to reopen and reconsider an action of the Board...under regulations of the Board.

(emphasis supplied). The Board's implementing regulations are equally clear:

> A person *at any time* may file a petition to reopen any administratively final action of the Board pursuant to the requirements of § 1115.3(c) and (d) of this part.

49 C.F.R. Part 1115.4 (emphasis added). To be sure, considerations of administrative repose play a legitimate role, *e.g.*, in determining the scope of reopening once grounds for such an action are shown. *See APS*, 6 S.T.B. at 855. However, it is inconsistent both with the governing statute and the Board's own regulations to impose a temporal condition apart from consideration of the merits of a petition. Applicable court precedent likewise imposes no such limitation on the ability of a party like TMPA to seek a re-evaluation of its rate prescription based on changed circumstances. *See, e.g., Burlington N. R.R. v. S.T.B.*, 114 F.3d 206, 215 (D.C. Cir. 1997) ("If future events prove the Board's market dominance or stand-alone cost determinations wrong, Burlington Northern can petition the Board to reconsider its rate order.")

In the instant case, TMPA brought the issue of the risk of loss of a portion of the rate relief to which TMPA was found entitled under *TMPA 2004* to the Board's

attention as soon as "future events" – BNSF's establishment of a rate substantially higher than that assumed by the Board in its prescription – showed that the "netting" feature in the Board's DCF analysis required constraints on BNSF's rate-setting subsequent to 2010. In relevant respects, this is the same course followed by BNSF and approved by the Board in the *West Texas Utilities*[28] litigation.

The 1996 Board decision in *West Texas Utilities* resulted in the imposition of a rate prescription limiting BNSF's pricing to 180% of the variable cost of service. While the Board had applied the SAC test in arriving at its conclusions, there was no mention of SAC rates in the prescription order. BNSF appealed the decision, but made no assignment of error based on the Board's omission of SAC rate levels from the final prescription. It was not until *seven (7) years later*, after BNSF's analysis of workpapers from the original decision indicated that SAC rates exceeded 180% of variable costs, that BNSF petitioned to revise the prescription to set rates at the higher of SAC or the jurisdictional threshold. BNSF acted only after circumstances arose whereunder the limited language of the initial prescription made a difference in the maximum rate that BNSF could charge, and the Board made the requested revision.[29] The same situation is presented here: TMPA moved for Board action once the implications of the "netting" process threatened the loss of a portion of the value of the original prescription. TMPA's raising of the issue of the impact of that process on post-2010 rates to Gibbons Creek

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[28] *W. Tex. Utils. Co. & Burlington N. R.R.*, 1 S.T.B. 638 (1996), *aff'd sub. nom., Burlington N. R.R. v. STB*, 114 F.3d 206 (D.C. Cir. 1997) ("*West Texas Utilities*").

[29] *West Texas Utilities*, 6 S.T.B. 919, 920-21 (2003).

both is supported by the governing statute, and is as timely and proper as the Board-approved petition of BNSF in *West Texas Utilities*. *See also APS*, 6 S.T.B. at 853-54 (railroad petition to reopen based on changed circumstances filed six (6) years after final decision).

III. THE SCOPE OF REOPENING ON SAC SHOULD BE LIMITED

As noted *supra*, *APS* is the principal precedential template for the scope of the reopening of this proceeding to consider the changed circumstances of projected revenues from the issue traffic and corrected and/or updated indices and forecasts. Therein, the Board found that where the case for reopening related to a "specifically identified" assumption in the prior prescription decision, an appropriate balancing of "the interests of fairness to all parties and of administrative finality and repose" required the scope of reopening to be limited to the impact of correcting the inaccurate assumption, and an "update [of] the record regarding any forecasts made in our prior decisions, such as inflation indexes, cost of rail equity, and revenue forecasts...that proved to be inaccurate." *APS*, 6 S.T.B. at 855-57 (citing *Wisconsin*, 5 S.T.B. at 984). In reaching this result, the Board *rejected* the complaining shipper's assertion that "all changed circumstances" since the time of the original decision should be considered. *APS*, 6 S.T.B. at 855. *See also APS*, 7 S.T.B. at 1023.

A similar approach was adopted by the Board in the earlier *West Texas Utilities* litigation. In response to a request by BNSF, the Board reopened the record in that proceeding to correct its earlier rate prescription to better conform to the evidence, an

action deemed necessary to remedy a material error. *West Texas Utilities*, 6 S.T.B. at 921. As in *APS*, the complaining shipper objected to this limited scope, arguing that it should have the opportunity to "change certain of the basic assumptions upon which the SAC analysis was predicated, such as the traffic group originally selected...." *Id.* The Board refused, however, finding that the correction sought by BNSF could be made without "relitigating almost the entire SAC case." *Id.* The Board reaffirmed this model when it considered standards to govern future requests to reopen and/or vacate rate prescriptions in *Major Issues*:[30]

> Some types of changes can be integrated into an old SAC analysis without undue complications and without compromising the integrity of the SAC analysis. Examples would be updating revenue forecasts or adjusting the indexes used to inflate the operating expenses and road property investment of the SARR

Major Issues at 70.

Consistent with its holdings in *APS* and *Wisconsin*, as subsequently endorsed in *Major Issues*, the Board in this case should reopen the SAC record for the limited purposes of correcting the analysis' assumptions regarding the rates and revenues attributable to the issue traffic beginning in 2011, and updating the record regarding forecasts and indices relied upon in *TMPA 2003* and *TMPA 2004* that have been superseded by actual data or newer forecasts. As outlined by witnesses Crowley and Fapp, the forecasts and indices that meet the *APS* criteria are the following:

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[30] *Major Issues in Rail Rate Cases*, STB Ex Parte No. 657 (Sub-No. 1) (STB served October 30, 2006).

1. Land inflation forecast.
2. Materials and supplies forecast.
3. Wages and supplements forecast
4. Material prices, wage rates and supplements (excluding fuel) forecast.
5. Cost of capital.
6. Cost of equity.
7. RCAF-Unadjusted for productivity.
8. RCAF-Adjusted for productivity.
9. Gross Domestic Product - Implicit Price Deflator.
10. Producer Price Index.
11. EIA Coal Transportation Rate Forecast.
12. EIA Coal Production Forecast.

V.S. Crowley/Fapp at 4.

As detailed the Verified Statement of Messrs. Crowley and Fapp, when the DCF analysis underlying the rate prescription table in *TMPA 2004* is revised to include the higher TMPA common carrier rates actually assessed in 2011 and conservatively projected through 2021, and the updated forecast and indexing data listed above, the revised prescription table shows stand-alone revenues in excess of costs for each year of the 20-year DCF period, and maximum SAC rates starting in 2011 as follows:

Table 2

Restatement of SAC-Based Maximum Rates

Year	Tariff Rates	Percent Reduction	Max. SAC Rate
2011	$29.70	18.61%	$24.17
2012	$31.21	11.64%	$27.58
2013	$31.84	9.90%	$28.69
2014	$32.36	6.43%	$30.28
2015	$32.97	4.66%	$31.43
2016	$33.48	7.29%	$31.04
2017	$33.73	10.59%	$30.16
2018	$34.01	13.36%	$29.47
2019	$34.23	15.64%	$28.88
2020	$34.38	15.71%	$28.98
2021 (1Q)	$34.38	14.19%	$29.50

See V.S. Crowley/Fapp at Exhibit No. 4.

In its *Enforcement Decision* (at 5), the Board suggested that were it to reopen this proceeding for any reason, it might "look at revisions to our SAC policies in the past 8 years," including the methodological policy changes adopted in 2006 in *Major Issues*, such as the shift from a 20-year DCF to a 10-year model. TMPA respectfully submits that such an approach would be legally improper and unfairly prejudicial.

First, the application of intervening policy changes would be inconsistent with precedent. In *APS*, the Board conducted a limited reopening some six (6) years after its original prescription decisions, the last of which was served in April, 1998. *See APS*, 3 S.T.B. 70 (1998). Between 1998 and 2004, the Board rendered decisions in a number of maximum rail rate cases evaluated under the *Coal Rate Guidelines,* including *Wisconsin; TMPA 2003; Duke Energy Corp. v. Norfolk S. Ry.*, 7 S.T.B. 89 (2003); and *FMC Wyoming, supra.* With each decision, the Board further refined and modified its approach to administering the *Guidelines*, crafted new tests and adopted new presumptions. None of these decisions or their impacts on the interpretation and execution of the SAC test were applied in the *APS* decision on reopening, and no "broad changes to the original SAC analysis" were recognized or permitted. *APS*, 7 S.T.B. at 1023. The same rule should apply here. *Cf., Wisconsin*, 5 S.T.B. at 984.

Second, the application of intervening modifications in the administration of the SAC test -- including in particular some of the changes adopted in *Major Issues* -- would be manifestly unjust to TMPA, which predicated its evidentiary case on the *Guidelines* as they were interpreted at the time and, under the governing *APS* rule, is precluded from changing in any material way. Exacerbating this inequity are the legal restrictions on the Board's ability to fully apply the *Major Issues* changes. For example, the Board in its *Enforcement Decision* referred to the determination in *Major Issues* that the length of the DCF analysis would be shortened from 20 years to 10 years. In light of the request for relief to which the *Enforcement Decision* was directed, the Board's reference was to the new, shorter duration of rate prescriptions. As Messrs. Crowley and

Fapp show, however, if it is assumed that the 10-year DCF period was applied to the original TMPA record, TMPA would have been entitled to a greater measure of rate relief over the 2001-2010 time period than was awarded in *TMPA 2004*. Indeed, based on records of the coal volumes shipped by TMPA over the time period, the additional aggregate relief to which it would have been entitled would be valued at over $13 million.[31] Because the *TMPA 2004* award was in the form of a rate prescription, however, the recognized prohibition against retroactive changes precludes TMPA from seeking or the Board granting a revision of the *TMPA 2004* award to reflect a 10-year DCF approach. *See Arizona Grocery Co. v. Atchison, Topeka & S.F. Ry.*, 284 U.S. 370, 389 (1932). *See also Assoc. Gas Distributers v. FERC*, 898 F.2d 809, 810 (D.C. Cir. 1990) (Williams, J. concurring). The asymmetry associated with applying even this single element of *Major Issues* to a reopening of this proceeding under the *APS* model demonstrates the manifest inequity of considering any changes other than the limited set described *supra*.

[31] *See* V.S. Crowley/Fapp at Exhibit No. 5.

IV. THE REVISED PRESCRIPTION MUST APPLY THE VARIABLE COST METHODOLOGIES USED IN *TMPA 2003*

In *TMPA 2003*, the Board determined the 180% revenue-to-variable cost ratio ("R/VC") jurisdictional threshold by making precise and defined movement specific adjustments to BNSF's system average variable costs, to reflect the traffic and operating characteristics of the TMPA trains, and to account for actual unit train-related costs in a variety of categories, including yard and road locomotive switching; handling of distributed power locomotives; carload handling unit cost; return on road property and depreciation expense; locomotive fuel unit costs; and train and engine crew expenses.[32]

For more than 30 years, the Board and its predecessor consistently held that movement specific traffic and operating characteristics and unit cost data is superior to system average figures. *See, e.g., Wisconsin*, 5 S.T.B. at 989. As the ICC held in *Rules to Govern the Assembling and Presenting of Cost Evidence*, 337 I.C.C. 298, 304 (1970), "[s]pecific cost data relating to the particular traffic and operations of the individual carriers involved should be developed, in preference to, and as being more reliable and possessing greater probative value than, general average costs covering the overall systemwide operations of a carrier, a group of carriers, or all carriers in a territory." *Id.*, 337 I.C.C. at 305. In the more recent past, and as ruled in this proceeding, the Board consistently found unit train coal service in particular is better suited to movement specific costing. *See, e.g., TMPA 2003*, 6 S.T.B. at 630 (excluding carload handling costs

[32] *See TMPA 2003*, 6 S.T.B. at 617-643. Some adjustments to individual cost findings were addressed and adjusted further in *TMPA 2004*, but the overall movement-specific methodology applied in *TMPA 2003* was affirmed.

because such services are not associated with the transportation of coal); *Wisconsin,* 5 S.T.B. at 992-93 (using lease costs for locomotives specifically used in the shipper's unit train service); *Carolina Power & Light Co. v. Norfolk S. Ry.*, 7 S.T.B. 235, 345 (2003) ("*Carolina P&L*") ("the parties' evidence regarding service units and operating statistics has been evaluated and, where necessary, restated to reflect the most accurate operating data possible...," including, *e.g.*, an adjustment to the tare weights of the coal cars and a movement specific determination of the number of locomotives per train). Specifically as regards the TMPA coal movement, the Board acknowledged the obvious cost efficiencies that unit trains provide, thereby warranting special consideration and examination. *See, e.g., TMPA 2003*, 6 S.T.B. at 617 ("Because a carrier's system-wide average costs are not necessarily representative of the costs of providing a particular service, movement-specific adjustments are sometimes introduced into evidence to better reflect the variable costs attributable to providing that service."). *See also Carolina P&L*, 7 S.T.B. at 345; *West Texas Utilities*, 1 S.T.B. at 717.

The Board's movement specific variable cost analysis in this case, and the resulting R/VC and jurisdictional threshold findings for 2001, were explained in detail in Appendix A to the *TMPA 2003* Decision. Referring to the potential need to update those variable costs for subsequent years, the Board directed that "[t]he parties should calculate this rate floor, in a manner consistent with the procedures and findings contained in Appendix A, as the necessary information for each time period becomes available." *TMPA 2003*, 6 S.T.B. at 608. Later, in *TMPA 2004*, the Board reiterated its ruling in the context of the application of the rate prescription to movements from new coal origins:

> In *TMPA 2003*...the Board expressly stated that, if Gibbons Creek traffic were to move in the future from other mines,...the parties should themselves make the determination whether the threshold was met using the variable costing procedures and findings contained in Appendix A of that decision.

TMPA 2004, 7 S.T.B. at 829.

Consistent with the Board's prior rulings in this case, for purposes of determining a 2011 jurisdictional threshold floor for a revised rate prescription,[33] variable costs must be calculated on a movement specific basis according to the methodology adopted in *TMPA 2003*. As described by witnesses Crowley and Fapp, this task is dependent on BNSF's disclosure of certain specific cost-related information for 2011 (or the most recent year for which the data is available), which corresponds to data previously produced by BNSF in discovery in this proceeding for the 2000 base year. TMPA is prepared to describe for BNSF specifically the data that is required promptly after the Board formally reopens this proceeding, and upon production of this information updated movement specific variable costs for 2011 can be calculated, and the associated jurisdictional threshold determined. The limited evidentiary schedule proposed by TMPA at p. 13, *supra*, accommodates this selective supplemental production, which can be assisted as necessary or appropriate by a Board staff-supervised technical conference.

[33] It is not necessary to calculate a jurisdictional threshold for any year prior to 2011, as *Arizona Grocery* and its progeny prohibit a retroactive revision of the previously prescribed rates for 2001 through 2010. As noted *supra*, a determination of variable costs for any year subsequent to 2011 is not possible at the present time, as the necessary cost data is not yet available. *TMPA 2003*, 6 S.T.B. at 608.

In *Major Issues*, the Board determined that as a general proposition, in calculating variable costs for future maximum rate adjudications it no longer would apply movement specific adjustments to system average carrier costs computed using the URCS Phase III model. *Id.* at 59-60. In its *Enforcement Decision*, the Board suggested in *dicta* that were it to reopen this proceeding, it would "look at...using our unadjusted Uniform Rail Costing System" to re-calculate variable costs. *Id.* at 5. TMPA respectfully submits that such a course would be erroneous as a matter of law, and cannot properly be followed here.

As a threshold matter, it is significant that the Board is not compelled by its enabling statute to preclude movement specific adjustments to system average variable costs in this case. To the contrary, Congress specifically granted the Board the discretion to make adjustments to URCS costs. *See* 49 U.S.C. § 10707(d)(1)(B) ("[V]ariable costs for a rail carrier shall be determined only by using such carrier's unadjusted costs, calculated using the Uniform Rail Costing System cost finding methodology (or an alternative methodology adopted by the Board in lieu thereof) and indexed quarterly to account for current wage and price levels in the region in which the carrier operates, *with adjustments specified by the Board.*") (emphasis supplied). In *Major Issues*, the Board on its own initiative elected as a matter of *policy* to revise the variable cost calculation procedures to be used in pending and new cases. However, the Board is not statutorily obligated to restate TMPA's variable costs using unadjusted URCS Phase III at this time, and the Board's prior rulings in *TMPA 2003* and *TMPA 2004* that future calculations of variable costs *in this case* must be performed "in a manner consistent with the procedures

and findings" in those decisions[34] confirm that there should be no application of a subsequent change in methodologies for this limited purpose. *Accord Productivity Adjustment-Implementation*, 2 S.T.B. 158, 159-161 (1996) (the Board is reticent to disturb previous determinations that employed a methodology which was later supplanted); *AEP Tex. N. Co. v. BNSF Ry.*, STB Docket No. 41191 (Sub-No. 1) (STB served May 15, 2009) (declining to restate the stand-alone railroad's cost of equity for historical periods even though the methodology was changed during the pendency of the case). The *TMPA 2003* and *TMPA 2004* decisions brought administratively finality to the methodological aspects of the variable cost calculation in this proceeding. The decisions were never appealed, and thus represent the final word on the applicable standards that should be applied to any updated determination of variable costs.

As noted *supra*, in *APS* the Board refused to allow a broad reopening of the proceeding, instead favoring limited evidence directed at specific changed circumstances and leaving undisturbed the other administratively final elements of the earlier decision. Other agency precedent likewise rejects revisiting settled issues. For example, in *Delaware & Hudson Ry. v. Consolidated Rail Corp. – Reciprocal Switching Agreement*, 9 I.C.C.2d 989 (1993), the ICC determined that the doctrine of *res judicata* barred a change in its prior holding,[35] notwithstanding a later ruling in another case that seemingly rejected a key determination in that prior decision. The earlier decision granted D&H

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[34] 6 S.T.B. at 608.

[35] *Delaware & Hudson Ry. v. Consolidated Rail Corp. -- Reciprocal Switching Agreement*, 367 I.C.C. 718 (1983) ("*D&H*").

reciprocal switching rights with Conrail in Philadelphia, but left the question of compensation to be negotiated by the parties in the first instance. After several years of unsuccessful negotiations, the bankruptcy of D&H, and its eventual acquisition by Canadian Pacific, Conrail moved to vacate the 1983 *D&H* decision.

In response to Conrail's motion, the ICC addressed two issues that are relevant here: (i) whether the initial *D&H* decision was *res judicata*; and (ii) whether intervening changes in the governing standard that applied when that decision was rendered required a change in the earlier holding. The ICC first determined that the *D&H* decision was *res judicata*. The agency noted that Conrail was an active participant in the case and had an opportunity to challenge the ICC's decision, but of its own accord declined to proceed with an appeal. Conrail thus was held "bound" by the *D&H* decision. The ICC also rejected Conrail's follow-up claim that even if the *D&H* decision was *res judicata*, the doctrine should not apply because "the decision is wrong as a matter of law, and was overruled by the Commission" in *Midtec*.[36] The agency noted that the *Midtec* decision departed from the policy that had been applied in *D&H*, but it nevertheless upheld the *D&H* decision, finding that *Midtec* did not "overrule the result" reached in *D&H*. *See Delaware & Hudson Railway Co.*, 9 I.C.C.2d at 994. The ICC noted that it did not reopen *D&H* in light of *Midtec,* nor did it view the *Midtec* decision as "requiring a different result."

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[36] *Id.*, 9 I.C.C. 2d at 994. *See Midtec Paper Corp. v. Chicago & N.W. Transp. Co.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988).

In the instant case, BNSF had an opportunity to appeal *TMPA 2003* and *TMPA 2004* to the U.S. Court of Appeals, but it did not do so. Likewise, BNSF did not seek reopening following the Board's decision in *Major Issues*, and the Board in *Major Issues* neither invited parties to relitigate prior variable cost determinations nor suggested that they would be adversely affected by the policy change. *TMPA 2003* and *TMPA 2004* set the governing standards for purposes of any restatement of variable costs that now is required, and they should not be disturbed.

CONCLUSION

For the reasons set forth herein and in the accompanying Verified Statement and Exhibits, the Board should reopen the decisions and orders in *TMPA 2003* and *TMPA 2004*, and revise the rate prescriptions therein adopted in the manner detailed in Parts II and III (as to SAC), and pursuant to the limited data production and supplemental submissions concerning variable costs described in Part IV.

Respectfully submitted,

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Dated: April 20, 2012

Attorneys and Practitioners

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April, 2012, I caused copies of the foregoing Petition to Reopen and Modify Rate Prescription to be served by hand on counsel for Defendant BNSF Railway Company, as follows:

Samuel M. Sipe, Jr., Esq.
Anthony J. LaRocca, Esq.
Steptoe & Johnson LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

Daniel M. Jaffe

EXHIBIT 1

BNSF Railway Company
Common Carrier Pricing Authority BNSF 90115

Effective Date: January 1, 2011

Expiration Date: December 31, 2011

Commodity: Raw sub-bituminous, STCC 11-21-Series (excluding artificially dried or processed coal) and STCC 11-22-Series

Origins: Wyoming coal mine origins cited herein.

Destination: Gibbons Creek Steam Generating Station located near Iola, TX.

Route: BNSF direct.

Rates: All rates are expressed in U.S. Dollars per net lading ton (2000 pounds avoirdupois) in BNSF provided rail cars.

Shipper: Shipper shall be the party tendering Coal for shipment pursuant to this Pricing Authority.

Origin Group	Origin Mines	Rate / ton in BNSF Railcars
WY PRB	Antelope, Belle Ayr, Black Thunder, Buckskin, Caballo, Clovis Point, Cordero, Caballo Rojo, Coal Creek, Dry Fork, Eagle Butte, Fort Union, East Thunder, North Antelope, Rawhide, and West Thunder.	**$29.70**

Railcar Supply and Tender Requirements: Railcars shall be provided by BNSF. The Minimum Tender for a train is one hundred twenty (120) such Railcars. Claims for damage to or destruction of such Railcars shall be handled in accordance with the procedures set forth in the Field Manual and Office Manual of the Association of American Railroads Interchange Rules, as amended from time to time.

Railcar and Trainload Weights: Weighing of Coal shipments tendered for transportation hereunder shall be subject to the provisions BNSF Price List 6041-series Items 130 and 210 in effect on the date such weighing is undertaken. The Minimum Weight per Trainload for freight billing purposes shall be determined by multiplying the number of furnished Railcars per Trainload by 120 net tons. Freight Charges will be assessed on the basis of the applicable Minimum Weight per Trainload or the actual weight of Coal per Trainload whichever is greater.

Minimum Annual Volume Commitment ("MAVC"): The Freight Rates enumerated herein are subject to a minimum annual volume commitment of 1,800,000 net tons per calendar year. Within 30 days following completion of a calendar year, shipper shall certify compliance with the MAVC provision. In the event shipper fails to meet the MAVC, the resulting volume shortfall will be subject to payment of liquidated damages, equal to 30% of the rate in effect on the last day of the calendar year times the amount of such volume shortfall.

Loading and Unloading: Loading and Unloading of shipments tendered for transportation hereunder shall be subject to the provisions of BNSF Price List 6041-series Items 110 and 120 in effect on the date that such loading and unloading commences.

Other Accessorial Services: Coal unit train accessorial services in addition to those described herein shall be subject to the provisions of BNSF Price List 6041-series or successors thereto in effect on the date such services are provided.

Billing and Payment: BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This **Common Carrier Authority BNSF 90115**, correct address and patron code must be shown on the Bill of Lading to insure accurate billing. Shipper shall establish credit with BNSF prior to requesting service hereunder. If credit is extended to Shipper for the payment of transportation charges, such payment shall be subject to the provisions of BNSF Rules Book 6100-series Item 3400 and successors thereto. In the event that shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgment could affect Shipper's ability to meet payment terms, BNSF may require Shipper to pay cash in advance of service for all amounts for which Shipper is liable under this Common Carrier Authority.

Other Provisions: Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000-series or its successor, BNSF Rules Book 6100-series, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time to time.

EXHIBIT 2

Exhibit 2

BNSF Railway Company

Dec 30, 2011 6:03:28 AM

Freight Bill

REVENUE MANAGEMENT
176 EAST FIFTH STREET
ST. PAUL, MN 55101-2601
PHONE (785) 676-3928

MAKE CHECKS PAYABLE TO
BNSF RAILWAY COMPANY
P O BOX 676152
DALLAS, TX 75267-6152

TO PAY BY WIRE/ACH
BANK NORTHERN TRUST-CHICAGO, IL
SWIFT # CNORUS 44
BANK ABA # 071000152
BNSF ACCOUNT # 31099171

If paying by Wire or ACH, please send remit detail to cashapps@bnsf.com.

TEXAS MUNICIPAL POWER AGENCY	FREIGHT BILL		BILL OF LADING NO.
	DATE	NUMBER	
3 1/2 N OF CARLOS ON 244	12/30/2011	086664423	CDFMIOG045
	PLEASE REFER TO THIS NUMBER WHEN MAKING REMITTANCE		THIS BILL NOW PAYABLE AND BECOMES DELINQUENT THIS MIDNIGHT OF
CARLOS, TX 77830			01/14/2012 ✓
Patron Code 081042 0001			

Switch Carrier Information – Origin: BNSF

CAR NUMBER	WAYBILL DATE	WAYBILL NUMBER	ORIGIN	DESTINATION
FURX 961065	12/24/2011	505580	DRY FORK JCT, WY	IOLA, TX

SHIPPER	CONSIGNEE
WHEELASN	TEXASMUNPOWA
DRYFORJCT, WY	IOLA, TX

DESCRIPTION OF ARTICLES, SPECIAL MARKS AND EXCEPTIONS	1121290	WEIGHT	RATE	FREIGHT	ADVANCES	PREPAID
BITUMINOUS COAL FOR FUEL OR STEAM PURPOSES		✓27380000				
			—AS PER NET TON			
Need to be disputed		27380000	31.21000	449424.00		
		0		0.00		
				449424.00		449424.00

WEIGHT AGREEMENT
SHIPPERS WEIGHT
GROSS 32558600
TARE 5178600
NET 27380000 ✓

$25.33 × 13,690.000 = $346,767.70 ✓

REFNUM UT CDFMIOG045A
REFNUM CT BNSF90115
WEIGHT CHANGE FROM 235620 TO 238000
CARS 117 NET TONS ✓13690.000 CONTRACT BNSF90115 ✓
REFNUM ZZ 13,690.000 NET TONS
AUTHORITY BNSF 00000901150000001000
RATE CLERK: B731684

GP	WAYBILL NUMBER	WAYBILL DATE	CAR INIT	CAR NUMBER	KIND	NET-WT	MIN-WT	LENGTH	HEIGHT	CCAP	BOL NUMBER
1	505580	12/24/2011	FURX	961065 ✓	GTR	234028	246252	47 0	13 00	4300	CDFMIOG045
1	505580	12/24/2011	FURX	961027	GTR	234017	246153	47 0	13 00	4300	CDFMIOG045
1	505580	12/24/2011	FURX	960022	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045

BNSF Railway Company

	WAYBILL		CAR							
GP	NUMBER	DATE	INIT	NUMBER	KIND	NET-WT	MIN-WT	LENGTH	HEIGHT	CCAP	BOL NUMBER
1	505580	12/24/2011	FURX	966739	GTR	234017	246153	47 9	12 10	4520	CDFMIOG045
1	505580	12/24/2011	FURX	966795	GTR	234017	246153	47 9	12 10	4520	CDFMIOG045
1	505580	12/24/2011	FURX	961846	GTR	234017	246153	47 0	12 10	4320	CDFMIOG045
1	505580	12/24/2011	FURX	963806	GTR	234017	246153	47 8	12 10	4437	CDFMIOG045
1	505580	12/24/2011	FURX	966653	GTR	234017	246153	47 9	12 10	4520	CDFMIOG045
1	505580	12/24/2011	FURX	966713	GTR	234017	246153	47 9	12 10	4520	CDFMIOG045
1	505580	12/24/2011	FURX	960016	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	FURX	963770	GTR	234017	246153	47 8	12 10	4437	CDFMIOG045
1	505580	12/24/2011	FURX	960175	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	65093	H9R	234017	246153	0 0	13 04	4200	CDFMIOG045
1	505580	12/24/2011	WFAX	65066	H9R	234017	246153	0 0	13 04	4200	CDFMIOG045
1	505580	12/24/2011	WFAX	94509	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94550	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94570	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94562	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94519	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94592	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94590	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94524	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94547	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94566	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94518	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94533	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
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1	505580	12/24/2011	WFAX	94553	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94543	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94539	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94564	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94612	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94614	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
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1	505580	12/24/2011	WFAX	94557	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94516	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94507	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94561	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94558	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94616	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94583	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94589	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94575	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045

BNSF Railway Company

	—WAYBILL—		—CAR—								
GP	NUMBER	DATE	INIT	NUMBER	KIND	NET-WT	MIN-WT	LENGTH	HEIGHT	CCAP	BOL NUMBER
1	505580	12/24/2011	WFAX	65008	H9R	234017	246153	0 0	13 04	4200	CDFMIOG045
1	505580	12/24/2011	WFAX	94541	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94546	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94530	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	65111	H9R	234017	246153	0 0	13 04	4200	CDFMIOG045
1	505580	12/24/2011	WFAX	94527	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94618	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94514	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94580	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94565	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94554	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94591	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94555	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BN	536285	GTR	234017	246153	47 8	12 03	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94602	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94540	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94502	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94520	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94588	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94510	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94549	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94501	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94581	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94573	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
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1	505580	12/24/2011	WFAX	94534	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94511	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94503	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94568	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94594	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94585	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94552	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94595	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94538	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94535	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94560	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94529	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94512	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94532	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94572	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94598	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94606	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045

BNSF Railway Company

GP	—WAYBILL— NUMBER	DATE	—CAR— INIT	NUMBER	KIND	NET-WT	MIN-WT	LENGTH	HEIGHT	CCAP	BOL NUMBER
1	505580	12/24/2011	WFAX	94551	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94569	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94596	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94559	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94528	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BN	527496	H6D	234017	246153	0 0	12 10	4000	CDFMIOG045
1	505580	12/24/2011	WFAX	94613	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94593	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94526	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94587	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94506	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94517	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94609	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94601	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94577	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BNSF	670030	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BNSF	671366	GTR	234017	246153	47 8	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BNSF	669743	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BNSF	672489	GTR	234017	246153	47 9	12 10	4520	CDFMIOG045
1	505580	12/24/2011	BNSF	670674	GTR	234017	246153	47 8	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BN	533614	GTR	234017	246153	47 8	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BN	533720	GTR	234017	246153	47 8	12 10	4400	CDFMIOG045
1	505580	12/24/2011	BNSF	670430	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94531	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94504	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94576	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94515	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94574	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94571	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
1	505580	12/24/2011	WFAX	94586	GTR	234017	246153	47 9	12 10	4400	CDFMIOG045
						27380000	28800000				

TOTAL DUE THIS BILL **$449,424.00**

EXHIBIT 3

THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY
COMMON CARRIER PRICING AUTHORITY BNSF 80042

Effective Date:	On or after January 1, 2001, upon expiration of Contract BN-C-2967
Expiration Date:	One year from the effective date, unless renewed or extended
Commodity:	Raw sub-bituminous Coal, STCC 11-21-Series (excluding artificially dried or processed coal)
Origins:	Wyoming Powder River Basin Mines listed in Attachment A
Destination	Gibbons Creek Steam Generating Station located near Carlos, TX
Route:	BNSF Direct
Rate:	$19.09 in U.S. Dollars per net ton of coal in carrier supplied cars, subject to quarterly adjustment to reflect changes in the RCAF-U on or after January 1, 2001.

Freight charges will be assessed on the basis of the applicable minimum weight per trainload or the actual weight of coal per trainload whichever is greater. The aforementioned rate is subject to a minimum annual volume of 1,800,000 tons per year.

Railcar Supply and Tender Requirements:

Carrier provided railcars shall be suitable for loading not less than 118 net tons of coal per carload. The minimum tender for a train of carrier railcars is 116 such railcars.

Claims for damage to or destruction of carrier railcars shall be handled in accordance with the procedures set forth in the field manual and office manual of the Association of American Railroads Interchange Rules, as amended from time-to-time.

Trainload and Railcar Weights:

Weights shall be ascertained at origin by shipper, its agent, or the coal mine operator, at no charge to BNSF, and will be provided to BNSF via either electronic data interchange or facsimile upon release of a loaded train. BNSF shall have the right to inspect and certify the origin scales. The minimum weight per trainload is 13,924 net tons of coal.

Loading:

Shipper or its agent shall be responsible for the provision of appropriate loading facilities. All cars in each shipment shall be tendered to BNSF for loaded movement within four (4) hours of actual or constructive placement for loading at origin ("Loading Free Time"). Actual placement is made when an empty train arrives at the designated loading point at origin and the train crew requests loading instructions. If actual placement is prevented due to any cause attributable to shipper, its agents, or the mine operator, BNSF may constructively place the train at any available hold point. In the event of constructive placement, loading free time shall begin when BNSF notifies shipper, its agents, or the mine operator that the train has arrived at the hold point and shall end when the train is actually placed at origin. Shipper shall pay a charge of $535 per hour or fraction thereof that a train is held in excess of loading free time.

Unloading:

Shipper or its agent shall be responsible for the provision of appropriate unloading facilities. All cars in each shipment shall be tendered to BNSF for empty movement within four (4) hours of actual or constructive placement for unloading at destination ("Unloading Free Time"). Actual placement is made when a loaded train arrives at the designated unloading point at destination and the train crew requests unloading instructions. If actual placement is prevented due to any cause attributable to shipper or its agents BNSF may constructively place the train at any available hold point. In the event of constructive placement, unloading free time shall begin when BNSF notifies shipper or its agents that the train has arrived at the hold point and shall end when the train is actually placed at destination. Shipper shall pay a charge of $535 per hour or fraction thereof that a train is held in excess of unloading free time.

Accessorial Services:

Coal unit train accessorial services and charges therefor, other than specified in this common carrier authority, shall be as described in BNSF Authority 6041-Series or successors thereto, except that no change in destination shall be permitted.

Billing and Payment:

BNSF will bill each shipment under the terms of the Uniform Straight Bill of Lading. All railcars for each shipment are to be billed on one (1) Bill of Lading. This Common Carrier Authority BNSF 90042, correct address and patron code must be shown on the bill of lading to insure accurate billing. Freight charges will be billed by BNSF and paid by shipper within fifteen (15) days of receipt of invoice by wire transfer. In the event that shipper does not make timely payment, or if adverse credit conditions occur, which in BNSF's judgement could affect shipper's ability to meet payment terms, BNSF may require shipper to pay cash in advance of service for all amounts for which shipper is liable under this Common Carrier Authority.

Other Provisions:

Shipments made under the provisions of this Common Carrier Authority are subject to the Uniform Freight Classification 6000-Series or its successor, applicable tariffs, statutes, federal regulatory rules and regulations, AAR rules, and other accepted practices within the railroad industry as may be amended from time-to-time.

Attachment A
(BNSF 90042)

Wyoming Powder River Basin Coal Origins

Coal Mine	BNSF Origin
Buckskin	Buckskin Jct.
Rawhide	Rawhide Jct.
Eagle Butte	Eagle Jct.
Dry Fork	Dry Fork Jct.
Fort Union	Union Jct.
Clovis Point	East Gillette Jct.
Caballo	Caballo Jct.
Belle Ayr	Belle Ayr Jct.
Caballo Rojo	Rojo Jct.
Cordero	Cordero Jct.
Coal Creek	Coal Creek Jct.
Jacobs Ranch	Jacobs Jct.
Black Thunder	Thunder Jct.
North Antelope / Rochelle	Nacco Jct.
North Rochelle	Rochelle
Antelope	Converse Jct.

V.S. YORK

BEFORE THE
SURFACE TRANSPORTATION BOARD

TEXAS MUNICIPAL POWER AGENCY	)	
Complainants,	)	
v.	)	**STB Docket No. NOR 42056**
THE BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY	)	
Defendants.	)	

VERIFIED STATEMENT OF
CRAIG YORK

My name is Craig York. I am the Acting General Manager of the Texas Municipal Power Agency ("TMPA"). My business address is P.O. Box 7000, 2.5 Mi. North on FM244, Carlos, Texas, 77830.

I affirm that I have personal knowledge of the facts stated in this Verified Statement, that I am competent to testify to them, and that I have the authority to make this Verified Statement on behalf of TMPA.

I further affirm that the document attached hereto as Exhibit "A" correctly reflects the amount of coal transported to TMPA's Gibbons Creek Steam Electric Station by the BNSF Railway in each of the years 2001 through 2010.

Exhibit A

Coal Received via BNSF at TMPA's Gibbons Creek Steam Electric Station for 2001-2010

Calendar Year	Tons Received
2001	2,088,645
2002	2,023,406
2003	2,150,895
2004	1,886,600
2005	1,996,436
2006	2,429,722
2007	1,924,432
2008	2,205,534
2009	2,036,218
2010	2,103,490

V.S. CROWLEY

BEFORE THE
SURFACE TRANSPORTATION BOARD

Texas Municipal Power Agency	)	
	)	**STB Docket No. NOR 42056**
v.	)	
The Burlington Northern And Santa Fe Railway Company	)	

Verified Statement

Of
Thomas D. Crowley
President

and

Daniel L. Fapp
Vice President

L.E. Peabody & Associates, Inc.
On Behalf Of
Texas Municipal Power Agency

April 20, 2012

TABLE OF CONTENTS PAGE

LIST OF EXHIBITS

EXHIBIT NO. (1)	EXHIBIT DESCRIPTION (2)
1	Statement Of Qualifications Of Thomas D. Crowley
2	Statement Of Qualifications Of Daniel L. Fapp
3	Comparison of TMPA Projected Rates Per Ton
4	Impact of Updated *TMPA* Rate Reduction Percentages
5	Impact of a 10-Year DCF Model Versus 20-Year DCF Model

I. INTRODUCTION

We are Thomas D. Crowley and Daniel L. Fapp. We are economists and, respectively, the President and a Vice President of L. E. Peabody & Associates, Inc., an economic consulting firm that specializes in solving economic, transportation, marketing, financial, accounting and fuel supply problems. Mr. Crowley has spent most of his consulting career of over forty (40) years evaluating fuel supply issues and railroad operations, including railroad costs, prices, financing, capacity and equipment planning issues. His assignments in these matters were commissioned by railroads, producers, shippers of different commodities, and government departments and agencies. A copy of his credentials is included as Exhibit No. 1 to this Verified Statement. Mr. Crowley and various members of L.E. Peabody and Associates, Inc. previously sponsored expert evidence and/or testimony on behalf of Texas Municipal Power Agency ("TMPA"), during earlier stages of this proceeding.

Mr. Fapp has been with L. E. Peabody & Associates, Inc. since 1997. During this time, he has worked on numerous projects dealing with railroad revenue, operational, economic and financial issues. Prior to joining L. E. Peabody & Associates, Inc., Mr. Fapp was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, where he also served as an officer and Treasurer of the three BHP Copper Inc. subsidiary railroads. Mr. Fapp has also served as a guest lecturer in graduate level finance and economics classes discussing corporate capital theory and costs of equity determination. A copy of his credentials is included as Exhibit No. 2 to this Verified Statement.

We have been requested by Counsel for TMPA to develop three specific analyses related to the Surface Transportation Board's ("STB") decisions in *TMPA*[1]. The three specific analyses are: 1) an update of the discounted cash flow ("DCF") model relied upon by the STB when

[1] Docket No. NOR 42056, *Texas Municipal Power Agency* v. *The Burlington Northern and Santa Fe Railway Company* ("*TMPA*").

issuing its *TMPA 2004* decision,[2] to correct what has proven to be an inaccurate assumption regarding the levels of rates that BNSF would assess on the issue traffic, and to update forecasted elements of the analysis based on information that has become publicly available since the STB's decision; 2) the development of a DCF model using the data relied upon by the STB in *TMPA 2004* that is predicated on a 10-year analysis, rather than the 20-year analysis used in the STB's prior decisions; and 3) the identification of the information needed from BNSF's internal records to update the STB's final movement specific variable cost determination in *TMPA 2003*[3] for 2011.

The results of each of our studies are summarized in the remainder of this Verified Statement and in our supporting Exhibits.

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[2] *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, 7 S.T.B. 803 (2004) ("*TMPA 2004*").

[3] *Texas Municipal Power Agency v. The Burlington Northern and Santa Fe Railway Company*, 6 S.T.B. 573 (2003) ("*TMPA 2003*").

II. UPDATING THE STB'S DCF MODEL

TMPA 2003 and *TMPA 2004* prescribed maximum reasonable rates for the transportation of coal by BNSF from mines in the Powder River Basin of Wyoming to TMPA's Gibbons Creek electric generating station in Texas. The STB applied the stand-alone cost ("SAC") constraint included in *Coal Rate Guidelines*[4] to determine the maximum rates. Key components of the SAC analysis were the forecast of future (post-2001) rates that BNSF would charge on the TMPA traffic, and forecasts of expected future changes in various elements of SAC revenues and costs based on certain established, published projections and indices.

The STB's prior SAC analysis assumed that BNSF would charge the issue traffic $25.33 per ton in 2011, $26.09 in 2012, and gradually increase the rate to $33.05 per ton by 2021.[5] However, BNSF actually charged TMPA $29.70 per ton for service in 2011, and $31.21 per ton for service late that year and early in 2012. If it is assumed that BNSF will continue to adjust the rate higher simply to cover inflationary impacts on its costs -- as measured by forecasted changes in BNSF's URCS costs -- we estimate that the 2021 rate will be $34.38 per ton, rather than $33.05 as assumed by the STB. Exhibit No. 3 includes a comparison of TMPA estimated rates for the 2011 through 1Q21 time period included in the *TMPA 2004* DCF model to the actual TMPA 2011 and 2012 tariff rates adjusted by a forecast of the annual change in the BNSF URCS index.

Since the *TMPA 2004* decision, the estimated values relied upon in developing a number of the other DCF components also have been superseded by actual values and updated public forecasts. Using the STB's *TMPA 2004* DCF model as the starting point, we updated the tariff rates paid by TMPA starting in 2011 as well as the indexes, forecasts and annual cost of capital determinations to reflect the information that has become publicly available since *TMPA 2004*.

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[4] *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985) ("*Coal Rate Guidelines*").

[5] The 20-year DCF model accepted by the STB modeled the period from 2Q 2001 to 1Q 2021, while the revenue forecast model accepted by the STB developed annual revenues for the years 2001 through 2020. To account for the 1Q 2021 revenues in the DCF model, the STB used the year 2020 rates and revenues developed in its revenue forecast model.

Specifically, the following elements in the traffic, revenue and DCF models were updated to reflect actual values and the latest available forecasts:

1. Land inflation forecast (DCF model);
2. Materials and supplies forecast (DCF model);
3. Wage rates and supplements forecast (DCF model);
4. Material prices, wage rates and supplements combined (excluding fuel) forecast (DCF model);
5. Cost of capital (DCF model);
6. Cost of equity (DCF model);
7. Rail Cost Adjustment Factor – Unadjusted for Productivity (DCF and Revenue models);
8. Rail Cost Adjustment Factor – Adjusted for Productivity (DCF and Revenue models);
9. Gross-Domestic Product – Implicit Price Deflator Forecast (Revenue model);
10. Producer Price Index Forecast (Revenue model);
11. EIA Coal Transportation Rate Forecast (Revenue model); and
12. EIA Coal Production Forecast (Traffic and DCF models).

The impact of these updates is that traffic declined in the outer years of the model life consistent with the EIA's most recent forecast (2012 Early Release), which shows declines in PRB coal production. However, this decline in traffic was counteracted by forecasts of higher coal transportation rates than previously assumed by the STB. The STB observed in its *TMPA 2003* decision that it used an EIA forecast that produced, on average, 1.4% increases in rates after 2005[6]. Since then, the EIA has projected much higher increases in future transportation rates. This is due in part to a modification of the EIA rate forecast methodology to include the impacts of railroad fuel surcharges in the rate forecasts. According to EIA's current forecasts, annual increases in coal transportation rates are expected to average 3.1%.

[6] See 6 S.T.B. at 603.

The impact of correcting the projection of issue traffic revenues and executing the updates to the DCF model is shown on Exhibit No. 4, Column (4).[7] The revised SAC data shows TMPA to be entitled to relief in all years of the DCF model life. This result is driven primarily by three factors. First, inflation was much higher than originally forecasted, especially land and materials and supplies inflation. This causes the model to backload the SAC investment which reduces the recovery of the SAC investment in the early years of the model life. This is why we see larger rate reductions in the early years, even though the forecast shows slightly less revenue. Second, updating the forecasts produces significantly more revenues for the stand-alone railroad, as rail rates on coal increased much faster subsequent to 2004 than originally estimated by the STB. Third, because there is no longer a need to net short falls against overpayments, the model results in larger rate reductions.

For comparative purposes, Exhibit No. 4 also includes the annual percent reductions included in the STB's *TMPA 2004* decision (Column (2)), and shows the maximum rates produced by the SAC model as originally executed in *TMPA 2004*, and alternatively with the correction and updates described above.

[7] In the *TMPA 2004* decision, the cumulative present value of the over payments equaled $108.2 million. After updating the forecasts, indexes, cost of capital values, etc., the cumulative over payments on a discounted basis equal $1,620.9 million, *see* e-workpaper "STB DCF FINAL Rev (2012 Update).123".

III. 10-YEAR VERSUS 20-YEAR DCF MODEL

At the time of *TMPA 2004*, the STB's SAC methodology relied upon a 20-year DCF analysis. In 2006 in its *Major Issues* decision,[8] the STB changed its approach and determined that henceforward its SAC test would use a 10-year DCF model time period. In a decision served in this proceeding on July 27, 2011, in response to an earlier petition by TMPA, the STB referred to its change to a 10-year DCF as potentially relevant to an updated review of the SAC analysis in TMPA's case.

Using the STB's DCF model supporting its *TMPA 2004* decision, we developed a 10-year model for the TMPA SAC analysis. The STB's DCF model in *TMPA 2004* was based on 20 years. In developing the 10-year model, we did not change or update any of the assumptions relied upon by the STB in developing its 20-year model in *TMPA 2004*, with one exception: we changed the model from an eighty (80) quarter analysis to a forty (40) quarter analysis. This approach is conservative and overstates the actual SAC that a 10-year model would produce, because we did not reflect the lower overall capital investment that would be associated with a 10-year study period.

A comparison of the results of the 10-year DCF model to the 20-year model is included in Exhibit No. 5 to this Verified Statement. In each of the years of the 10-year DCF, the percent rate reductions increased as compared to the 20-year DCF. Put another way, had the rates under challenge in *TMPA 2003* and *TMPA 2004* been evaluated using a 10-year DCF model based on the same evidentiary record, TMPA would have been entitled to a greater measure of rate relief over the 2001-2010 time period than it ultimately received in *TMPA 2004*. In the aggregate, TMPA would have received at least $13.2 million more in rate reductions had a 10-year DCF model been applied.[9] The reasons for these greater reductions include:

1. Moving from a 20-year to a 10-year analysis impacts the weighted average asset inflation value, which subsequently impacts the real cost of capital used

[8] *Major Issues in Rail Rate Cases*, EP 657 (Sub-No. 1) (STB served Oct. 30, 2008) at 61-66.
[9] *See* Exhibit No. 5, Column (7), Line 25.

to develop replacement values. The impact is to lower the future replacement costs, and therefore the investment costs for the stand alone railroad;

2. SAC investment costs are further lowered because the 10 year model takes into consideration future interest amortization and depreciation tax benefits sooner than in a 20 year model. This provides greater tax shield benefits; and

3. Because we no longer have underpayments in years 11 through 20, there is no netting with the years 1 to 10 overpayments. In other words, years 1 through 10 rate reductions are not limited to cover stand-alone revenue shortfalls in future years.

Exhibit No. 5 also includes the maximum rates produced by the 20-year *TMPA 2004* SAC model and alternative rates based on a 10-year SAC model.

IV. MOVEMENT SPECIFIC INFORMATION NEEDED TO DEVELOP VARIABLE COSTS

The STB relied upon movement specific data in developing BNSF's variable costs of service and the resulting jurisdictional threshold[10] in its *TMPA 2003* decision[11]. Therein, the STB also directed that should it be necessary to calculate variable costs for years subsequent to 2001 (the last year for which data was available at the time of *TMPA 2003*), in the future the calculations should be performed "in a manner consistent with the procedures and findings contained in Appendix A [to the decision], as the necessary information for each time period becomes available."[12] The movement specific adjustments to BNSF system average 2000 Uniform Railroad Costing System ("URCS") units costs used by the STB were developed from information provided by BNSF to TMPA in the discovery phase of the proceeding. In order to properly update BNSF's variable cost of service and resulting jurisdictional threshold consistent with the STB's mandate in *TMPA 2003*, to compare with the revised SAC rates shown in Exhibit No. 3, the same or similar information for 2011 (the most recent year) must be made available by BNSF.

The movement specific adjustments identified and made by the STB using BNSF provided confidential data include:

1. Traffic and operating factors including miles, number of locomotives, tare tons per car, net tons per car and cars per train for each issue movement;
2. Yard switching and bad order car switching;
3. Carload handling expenses;
4. Return on and of road property investment;
5. Locomotive fuel;
6. Loop track adjustment;

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[10] Variable costs x 1.80.

[11] The STB's variable cost calculations were summarized in *TMPA 2003* and supported by confidential STB work papers.

[12] 6 S.T.B. at 608.

7. Train crew wage adjustment;
8. Helper service for locomotives and crews;
9. Locomotive capital;
10. Car repairs-user responsibility;
11. Spare margin for cars;
12. Car capital and maintenance costs;
13. Joint facility cost;
14. Third party loading;
15. End of train devise; and
16. Actual loss and damage.

To the best of our knowledge, based upon prior experience with BNSF's record-keeping, the data sources needed to update the movement specific adjustments for 2011 either exist in raw form, or can be obtained through queries of computer data bases. None of the movement-specific adjustments listed requires BNSF to conduct a "special study" on TMPA's behalf. These BNSF records (or BNSF replacements records with the same information) should be provided for 2011 (or for the most recent year available) in order to calculate movement specific variable costs for that year. We have been advised that there are legal prohibitions against retroactively changing the rates prescribed by the STB in *TMPA 2004* for application to the years up to and including 2010, which makes the recalculation of variable costs for those years unnecessary. Variable costs for years subsequent to 2011 cannot be calculated until each year ends, as the STB noted in *TMPA 2003*. 6 S.T.B. at 608.

THOMAS D. CROWLEY
STATEMENT OF QUALIFICATIONS

My name is Thomas D. Crowley. I am an economist and President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, Virginia 22314, 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737, and 21 Founders Way, Queensbury, New York 12804.

I am a graduate of the University of Maine from which I obtained a Bachelor of Science degree in Economics. I have also taken graduate courses in transportation at George Washington University in Washington, D.C. I spent three years in the United States Army and since February 1971 have been employed by L. E. Peabody & Associates, Inc.

I am a member of the American Economic Association, the Transportation Research Forum, and the American Railway Engineering and Maintenance-of-Way Association.

The firm of L. E. Peabody & Associates, Inc. specializes in analyzing matters related to the rail transportation of all commodities. As a result of my extensive economic consulting practice since 1971 and my participation in maximum-rate, rail merger, service disputes and rule-making proceedings before various government and private governing bodies, I have become thoroughly familiar with the rail carriers that move coal over the major coal routes in the United States. This familiarity extends to subjects of railroad service, costs and profitability, cost of capital, railroad capacity, railroad traffic prioritization and the structure and operation of the various contracts and tariffs that historically have governed the movement of traffic by rail.

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As an economic consultant, I have organized and directed economic studies and prepared reports for railroads, freight forwarders and other carriers, for shippers, for associations and for state governments and other public bodies dealing with transportation and related economic problems. Examples of studies I have participated in include organizing and directing traffic, operational and cost analyses in connection with multiple car movements, unit train operations for coal and other commodities, freight forwarder facilities, TOFC/COFC rail facilities, divisions of through rail rates, operating commuter passenger service, and other studies dealing with markets and the transportation by different modes of various commodities from both eastern and western origins to various destinations in the United States. The nature of these studies enabled me to become familiar with the operating practices and accounting procedures utilized by railroads in the normal course of business.

Additionally, I have inspected and studied both railroad terminal and line-haul facilities used in handling various commodities, including unit train coal movements from coal mine origins in the Powder River Basin and in Colorado to various utility destinations in the eastern, mid-western and western portions of the United States and from the Eastern coal fields to various destinations in the Mid-Atlantic, northeastern, southeastern and mid-western portions of the United States. These operational reviews and studies were used as a basis for the determination of the traffic and operating characteristics for specific movements of numerous commodities handled by rail.

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I have frequently been called upon to develop and coordinate economic and operational studies relative to the rail transportation of various commodities. My responsibilities in these undertakings included the analyses of rail routes, rail operations and an assessment of the relative efficiency and costs of railroad operations over those routes. I have also analyzed and made recommendations regarding the acquisition of railcars according to the specific needs of various shippers. The results of these analyses have been employed in order to assist shippers in the development and negotiation of rail transportation contracts which optimize operational efficiency and cost effectiveness.

I have developed property and business valuations of privately held freight and passenger railroads for use in regulatory, litigation and commercial settings. These valuation assignments required me to develop company and/or industry specific costs of debt, preferred equity and common equity, as well as target and actual capital structures. I am also well acquainted with and have used the commonly accepted models for determining a company's cost of common equity, including the Discounted Cash Flow Model ("DCF"), Capital Asset Pricing Model ("CAPM"), and the Farma-French Three Factor Model.

Moreover, I have developed numerous variable cost calculations utilizing the various formulas employed by the Interstate Commerce Commission ("ICC") and the Surface Transportation Board ("STB") for the development of variable costs for common carriers, with particular emphasis on the basis and use of the Uniform Railroad Costing System

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("URCS") and its predecessor, Rail Form A. I have utilized URCS/Rail form A costing principles since the beginning of my career with L. E. Peabody & Associates Inc. in 1971.

I have frequently presented both oral and written testimony before the ICC, STB, Federal Energy Regulatory Commission, Railroad Accounting Principles Board, Postal Rate Commission and numerous state regulatory commissions, federal courts and state courts. This testimony was generally related to the development of variable cost of service calculations, rail traffic and operating patterns, fuel supply economics, contract interpretations, economic principles concerning the maximum level of rates, implementation of maximum rate principles, and calculation of reparations or damages, including interest. I presented testimony before the Congress of the United States, Committee on Transportation and Infrastructure on the status of rail competition in the western United States. I have also presented expert testimony in a number of court and arbitration proceedings concerning the level of rates, rate adjustment procedures, service, capacity, costing, rail operating procedures and other economic components of specific contracts.

Since the implementation of the *Staggers Rail Act of 1980*, which clarified that rail carriers could enter into transportation contracts with shippers, I have been actively involved in negotiating transportation contracts on behalf of shippers. Specifically, I have advised shippers concerning transportation rates based on market conditions and carrier competition, movement specific service commitments, specific cost-based rate adjustment provisions, contract reopeners that recognize changes in productivity and cost-based ancillary charges.

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I have been actively engaged in negotiating coal supply contracts for various users throughout the United States. In addition, I have analyzed the economic impact of buying out, brokering, and modifying existing coal supply agreements. My coal supply assignments have encompassed analyzing alternative coals to determine the impact on the delivered price of operating and maintenance costs, unloading costs, shrinkage factor and by-product savings.

I have developed different economic analyses regarding rail transportation matters for over sixty (60) electric utility companies located in all parts of the United States, and for major associations, including American Paper Institute, American Petroleum Institute, Chemical Manufacturers Association, Coal Exporters Association, Edison Electric Institute, Mail Order Association of America, National Coal Association, National Industrial Transportation League, North America Freight Car Association, the Fertilizer Institute and Western Coal Traffic League. In addition, I have assisted numerous government agencies, major industries and major railroad companies in solving various transportation-related problems.

In the two Western rail mergers that resulted in the creation of the present BNSF Railway Company and Union Pacific Railroad Company and in the acquisition of Conrail by Norfolk Southern Railway Company and CSX Transportation, Inc., I reviewed the railroads' applications including their supporting traffic, cost and operating data and provided detailed evidence supporting requests for conditions designed to maintain the competitive rail

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environment that existed before the proposed mergers and acquisition. In these proceedings, I represented shipper interests, including plastic, chemical, coal, paper and steel shippers.

I have participated in various proceedings involved with the division of through rail rates. For example, I participated in ICC Docket No. 35585, *Akron, Canton & Youngstown Railroad Company, et al. v. Aberdeen and Rockfish Railroad Company, et al.* which was a complaint filed by the northern and mid-western rail lines to change the primary north-south divisions. I was personally involved in all traffic, operating and cost aspects of this proceeding on behalf of the northern and mid-western rail lines. I was the lead witness on behalf of the Long Island Rail Road in ICC Docket No. 36874, *Notice of Intent to File Division Complaint by the Long Island Rail Road Company*.

STATEMENT OF QUALIFICATIONS

My name is Daniel L. Fapp. I am Vice President of the economic consulting firm of L. E. Peabody & Associates, Inc. The firm's offices are located at 1501 Duke Street, Suite 200, Alexandria, VA 22314; 760 E. Pusch View Lane, Suite 150, Tucson, Arizona 85737; and 21 Founders Way, Queensbury, New York 85737.

I received a Bachelor of Science degree in Business Administration with an option in Marketing (cum laude) from the California State University, Northridge in 1987, and a Master of Business Administration degree from the University of Arizona's Eller College of Management in 1993, specializing in finance and operations management. I am also a member of Beta Gamma Sigma, the national honor society for collegiate schools of business.

I have been employed by L. E. Peabody & Associates, Inc. since December 1997. Prior to joining L. E. Peabody & Associates, Inc., I was employed by BHP Copper Inc. in the role of Transportation Manager - Finance and Administration, and where I also served as an officer and treasurer of the three BHP Copper Inc. subsidiary railroads, The San Manual Arizona Railroad, the Magma Arizona Railroad (also known as the BHP Arizona Railroad) and the BHP Nevada Railroad. I have also held operations management positions with Arizona Lithographers in Tucson, AZ and MCA-Universal Studios in Universal City, CA.

While at BHP Copper Inc., I was responsible for all financial and administrative functions of the company's transportation group. I also directed the BHP Copper Inc. subsidiary railroads' cost and revenue accounting staff, and managed the San Manuel Arizona Railroad's and BHP Arizona Railroad's dispatchers and the railroad dispatching functions. I served on the company's Commercial and Transportation Management Team and the company's Railroad Acquisition Team where I was responsible for evaluating the acquisition of new railroads,

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including developing financial and economic assessment models. While with MCA-Universal Studios, I held several operations management positions, including Tour Operations Manager, where my duties included vehicle routing and scheduling, personnel scheduling, forecasting facilities utilization, and designing and performing queuing analyses.

As part of my work for L. E. Peabody & Associates, Inc., I have performed and directed numerous projects and analyses undertaken on behalf of utility companies, short line railroads, bulk shippers, and industry and trade associations. Examples of studies which I have participated in organizing and directing include, traffic, operational and cost analyses in connection with the rail movement of coal, metallic ores, pulp and paper products, and other commodities. I have also analyzed multiple car movements, unit train operations, divisions of through rail rates and switching operations throughout the United States. The nature of these studies enabled me to become familiar with the operating procedures utilized by railroads in the normal course of business.

Since 1997, I have participated in the development of cost of service analyses for the movement of coal over the major eastern and western coal-hauling railroads. I have conducted on-site studies of switching, detention and line-haul activities relating to the handling of coal. I have also participated in and managed several projects assisting short-line railroads. In these engagements, I assisted short-line railroads in their negotiations with connecting Class I carriers, performed railroad property and business evaluations, and worked on rail line abandonment projects.

I have been frequently called upon to perform financial analyses and assessments of Class I, Class II and Class III railroad companies. I have determined the Going Concern Value

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of privately held freight and passenger railroads, including developing company specific costs of debt and equity for use in discounting future company cash flows. My consulting assignments regularly involve working with and determining various facets of railroad financial issues, including cost of capital determinations. In these assignments, I have calculated railroad capital structures, market values, cost of railroad debt, cost of preferred railroad equity and common railroad equity. I am also well acquainted with and have used financial industry accepted models for determining a firm's cost of equity, including Discounted Cash Flow Model ("DCF") models, Capital Asset Pricing Model ("CAPM"), Farma-French Three Factor Model and Arbitrage Pricing Models. Based on these assignments, I have frequently spoken and provided guest lectures on developing divisional, corporate and industry costs of equity to undergraduate and graduate level classes.

In my tenure with L. E. Peabody & Associates, Inc., I have presented stand-alone cost evidence in numerous proceedings before the STB, and presented evidence in several STB Ex Parte proceedings, including proceedings addressing railroad fuel surcharges and railroad industry cost of capital. In addition, my reports on railroad valuations have been used as evidence before the Nevada State Tax Commission.

Comparison of TMPA Projected Rates Per Ton

	Quarter/ Year (1)	TMPA Rates Per Ton In STB Decision 1/ (2)	TMPA Rates With Actual 2011 and 2012 Rates To TMPA 2/ (3)
1.	2011	$25.33	$29.70
2.	2012	26.09	31.21
3.	2013	26.88	31.84
4.	2014	27.68	32.36
5.	2015	28.51	32.97
6.	2016	29.37	33.48
7.	2017	30.25	33.73
8.	2018	31.16	34.01
9.	2019	32.09	34.23
10.	2020	33.05	34.38
11.	2021 1 Qtr 3/	33.05	34.38

1/ Source: *TMPA 2004* STB workpapers.

2/ Years 2011 and 2012 equal actual rates paid by TMPA. Years 2013 through 2020 are based on Year 2012 rate adjusted by the forecasted change in the BNSF URCS Index.

3/ The STB's *TMPA 2004* DCF model used 2020 rates per ton for 1Q 2021.

Impact of Updated TMPA Rate Reduction Percentages

	Quarter/ Year	*TPMA 2004* Decision		Updated Rates and Forecasts	
		Percent Reduction 1/	SAC Rates Per Ton 1/	Percent Reduction 2/	SAC Rates Per Ton 2/
	(1)	(2)	(3)	(4)	(5)
1.	2001 2 Qtr	2.54%	$18.61	19.02%	$15.46
2.	2001 3 Qtr	2.36%	18.83	18.55%	15.70
3.	2001 4 Qtr	2.18%	18.97	18.21%	15.86
4.	2002	3.19%	18.93	23.15%	14.64
5.	2003	1.64%	19.73	20.45%	15.79
6.	2004	1.32%	20.37	18.20%	16.93
7.	2005	2.10%	20.81	15.81%	18.88
8.	2006	1.54%	21.55	16.64%	19.59
9.	2007	1.63%	22.16	16.07%	19.87
10.	2008	1.45%	22.84	22.27%	21.80
11.	2009	1.05%	23.63	15.15%	20.24
12.	2010	0.59%	24.45	20.89%	21.18
13.	2011	0.00%	25.33	18.61%	24.17
14.	2012	0.00%	26.09	11.64%	27.58
15.	2013	0.00%	26.88	9.90%	28.69
16.	2014	0.00%	27.68	6.43%	30.28
17.	2015	0.00%	28.51	4.66%	31.43
18.	2016	0.00%	29.37	7.29%	31.04
19.	2017	0.00%	30.25	10.59%	30.16
20.	2018	0.00%	31.16	13.36%	29.47
21.	2019	0.00%	32.09	15.64%	28.88
22.	2020	0.00%	33.05	15.71%	28.98
23.	2021 1 Qtr	0.00%	33.05	14.19%	29.50

1/ Source: *TMPA 2004* Decision workpapers.

2/ Source: Crowley/Fapp workpaper "STB DCF FINAL Rev (with 2012 rates and updated forecasts).123"

Impact of a 10-Year DCF Model Versus 20-Year DCF Model

	Quarter/ Year	*TPMA 2004* Decision Percent Reduction 1/	*TPMA 2004* Decision SAC Rates Per Ton 1/	*TPMA 2004* Decision With 10-Year DCF Model Percent Reduction 2/	*TPMA 2004* Decision With 10-Year DCF Model SAC Rates Per Ton 2/	Annual Shipments - Tons 3/	Additional Rate Relief 4/
	(1)	(2)	(3)	(4)	(5)	(6)	(7)
1.	2001 2 Qtr	2.54%	$18.61	6.40%	$17.87	522,161	$386,399
2.	2001 3 Qtr	2.36%	18.83	6.03%	18.12	522,161	370,735
3.	2001 4 Qtr	2.18%	18.97	5.66%	18.29	522,161	355,070
4.	2002	3.19%	18.93	7.77%	18.03	2,023,406	1,821,065
5.	2003	1.64%	19.73	4.61%	19.13	2,150,895	1,290,537
6.	2004	1.32%	20.37	3.96%	19.82	1,886,600	1,037,630
7.	2005	2.10%	20.81	5.52%	20.09	1,996,436	1,437,434
8.	2006	1.54%	21.55	4.38%	20.93	2,429,722	1,506,428
9.	2007	1.63%	22.16	4.56%	21.50	1,924,432	1,270,125
10.	2008	1.45%	22.84	4.18%	22.21	2,205,534	1,389,486
11.	2009	1.05%	23.63	3.35%	23.08	2,036,218	1,119,920
12.	2010	0.59%	24.45	2.41%	24.01	2,103,490	925,536
13.	2011 1 Qtr	0.59%	25.33	2.03%	24.82	521,160	265,792
14.	2011	0.00%	25.33	---	---	---	---
15.	2012	0.00%	26.09	---	---	---	---
16.	2013	0.00%	26.88	---	---	---	---
17.	2014	0.00%	27.68	---	---	---	---
18.	2015	0.00%	28.51	---	---	---	---
19.	2016	0.00%	29.37	---	---	---	---
20.	2017	0.00%	30.25	---	---	---	---
21.	2018	0.00%	31.16	---	---	---	---
22.	2019	0.00%	32.09	---	---	---	---
23.	2020	0.00%	33.05	---	---	---	---
24.	2021 1 Qtr	0.00%	33.05	---	---	---	---
25.	**Totals 5/**					**20,844,376**	**$13,176,156**

1/ Source: *TMPA 2004* Decision workpapers.
2/ Source: Crowley/Fapp workpaper "STB DCF FINAL Rev (10 year).123."
3/ Source: York VS Exhibit A. 2Q 2001 to 4Q 2001 equal pro-rata share of 2001 annual volume. 1Q 2011 equals pro-rata share of 2011 annual volume.
4/ [Column (3) - Column (5)] × Column (6).
5/ Sum of Lines 1 to 13.

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, THOMAS D. CROWLEY, verify under penalty of perjury that I have read the foregoing Verified Statement of Thomas D. Crowley, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Thomas D. Crowley

Sworn to and subscribed
before me this 20th day of April, 2012

Helen Mary Koch
I was commissioned notary as Helen Mary Lunsford
Notary Public for the State of Virginia

My Commission Expires: May 31, 2015
Registration Number: 7507963

VERIFICATION

COMMONWEALTH OF VIRGINIA)
)
CITY OF ALEXANDRIA)

I, DANIEL L. FAPP, verify under penalty of perjury that I have read the foregoing Verified Statement of Daniel L. Fapp, that I know the contents thereof, and that the same are true and correct. Further, I certify that I am qualified and authorized to file this statement.

Daniel L. Fapp

Sworn to and subscribed
before me this day 20 day of April, 2012.

Diane R. Kavounis
Notary Public for the State of Virginia

My Commission expires: November 30, 2012
Registration Number: 7160645